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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAR 21 1997

Federal Communications Commission
Washington, DC 20554

In the Matter of

Review of the Commission's
Regulations Governing Attribution
of Broadcast and Cable/MDS Interests

MM Docket No. 94-150

Review of the Commission's
Regulations and Policies Affecting
Investment in the Broadcast Industry

MM Docket No. 92-51

Reexamination of the Commission's
Cross-Interest Policy

MM Docket No. 87-154

REPLY COMMENTS OF ABC, INC.

Alan N. Braverman
Sr. Vice President & General Counsel

Sam Antar
Vice President, Law & Regulation

Roger C. Goodspeed
General Attorney, Law & Regulation

ABC, Inc.
77 West 66th Street
New York, New York 10023

Counsel for ABC, Inc.

March 21, 1997

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To: The Commission

REPLY COMMENTS OF ABC, INC.

ABC, Inc. ("ABC") submits herewith its Reply Comments in response to the Further Notice of Proposed Rule Making ("Notice") in the above-entitled proceeding.¹ ABC owns and operates the ABC Television Network and ten television broadcast stations.

In ABC's comments in this proceeding in 1995 and in our opening comments in response to the Notice, we agreed with the Commission that some attribution mechanism may be necessary to catch substantial or aggregate non-attributable interests that give

¹ MM Docket No. 94-150, MM Docket No. 92-51 and MM Docket No. 87-154, Further Notice of Proposed Rule Making, FCC 96-436 (released November 7, 1996).

the holder control over core license decision-making. However, we cautioned that the Commission must avoid setting attribution benchmarks that are overbroad.² Overly broad attribution rules would artificially interfere with competition and limit the availability of capital to broadcasters at a time when they face requirements for substantial investment in new technology. In our view, the Commission's proposed "equity or debt plus" attribution rule is seriously overbroad because it would impute ownership to parties on the basis of relationships with licensees that are not relevant to control.

In their opening comments in response to the Notice, Media Access Project, et al. ("MAP") agrees with the Commission's "equity or debt plus" proposal, but urges without any factual or analytical support that the threshold be set even lower than the 33% proposed by the Commission: MAP suggests a 20% threshold.³ MAP and the Network Affiliated Station Alliance ("NASA") agree with the Commission that a party's status as a program supplier is an appropriate trigger for application of the equity or debt attribution threshold.⁴ Viacom, Inc. ("Viacom") endorses a more

² Comments of Capital Cities/ABC, Inc., filed in MM Docket Nos. 94-150, 92-51 and 87-154 (May 16, 1995) at 15-16; ABC Opening Comments at 3-9.

³ Comments Media Access Project, et al., filed in MM Docket Nos. 94-150, 92-51 and 87-154 (Feb. 7, 1997) ("MAP Comments") at 19.

⁴ See Comments of Network Affiliated Stations Alliance, filed in MM Docket Nos. 94-150, 92-51 and 87-154 (Feb. 7, 1997) ("NASA Comments") at 6-8.

stringent version the Commission's "equity or debt plus" proposal which, in the case of network program suppliers, would call for attribution above a 10% level of investment.⁵

In its 1995 Attribution Notice, the Commission articulated the applicable standard in evaluating attribution alternatives: the "judgment as to what level of 'influence' should be subject to restriction by the multiple ownership rules has... been based on [the Commission's] judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions."⁶ In our view, neither the Commission, nor commenters MAP, NASA or Viacom, have made a persuasive showing that a presumption of control over a licensee's core operation's should be applied based on an interest-holder's status as a program supplier or based on an "equity or debt plus" investment at levels as low as 33%.

I. A Party's Status as a Program Supplier
Pursuant to an Arm's Length Agreement With
a Licensee Does Not Justify Attribution
of Ownership.

None of the commenters supporting the Commission's "equity or debt plus" proposal provide any rational basis upon which to conclude that acting as a program supplier to a station gives a

⁵ Comments of Viacom, Inc., filed in MM Docket Nos. 94-150, 92-51 and 87-1564 (Feb. 7, 1987) ("Viacom Comments") at 3,7-8.

⁶ Notice of Proposed Rule Making, MM Docket Nos. 94-150, 92-51 and 87-154 (released Jan. 12, 1995), par. 4.

party the ability to affect any station decisions beyond the terms of the program-supply arrangement into which the station voluntarily entered. MAP asserts without substantiation that "the ability of all these entities [networks, syndicators, program producers and LMA brokers] to influence programming is clear." However, it provides no example or explanation how a party's status as a program supplier endows it with such ability.⁷ MAP adds that networks' ability to influence a station's programming "is much greater now than it has ever been" based on the repeal of the fin-syn rules and the prime time access rules.⁸ The glaring flaw in MAP's reasoning is that although those rules may give networks certain new program distribution opportunities, they by no means give networks -- or any other program supplier -- the power to force programming onto stations against their will.

NASA similarly assumes but does not explain how networks can enforce program decisions against an unwilling station. According to NASA, "affiliates depend on networks for large parts

⁷ MAP Comments at 15. MAP cites BBC License Subsidiary, 10 FCC Rcd 7926 (1995), but appears to suggest that any ability the program supplier there had to affect programming came from the various ownership interests it held in the station rather than from program-supply arrangements. MAP's inclusion of LMA brokers as program suppliers whose arrangements give them control of licensees is beside the point since the Commission has proposed in this proceeding to attribute LMAs. Notice, par. 27.

⁸ MAP Comments at 15 n.9. MAP also cites the Commission's proposal to repeal certain network-affiliate rules as enhancing program suppliers' ability to influence programming, but MAP fails to explain how a proposed rule change can have any effect on a party's influence over a station.

of their broadcast day, and this relationship severely diminishes affiliates' ability to make independent programming decisions."⁹ What NASA ignores is that affiliated stations voluntarily choose to enter into affiliation agreements. They freely undertake the programming obligations in those agreements and continue to enjoy the right of independent judgment over carriage of network programs under the Commission's "right to reject" rule.¹⁰ Moreover, an affiliation agreement places no restriction on a station's non-network programming, and a network gains no "influence" over an affiliate's local program selection by entering into an affiliation arrangement.¹¹

Viacom similarly misconstrues the nature of the network-affiliate relationship and posits network influence over station programming that does not exist.¹² But Viacom relies on the same

⁹ NASA Comments at 8.

¹⁰ 47 C.F.R. 73.658(e).

¹¹ NASA suggests that networks "have no significant incentive to advance or even accommodate localism" in their affiliates' programming. NASA Comments at 5. As we have previously explained to the Commission, and contrary to NASA's argument, networks rely on and benefit from their affiliates' local program efforts. It is the unique blend of local and national programming that makes affiliated stations such a popular program source. See Comments of Capital Cities/ABC, Inc., filed in MM Docket Nos. 91-221 and 87-8 (July 10, 1995) at 4-16.

¹² Viacom Comments at 10. It is not clear from Viacom's comments whether the UPN network, in which Viacom holds a 50% interest, would qualify as a "network" under Viacom's proposed rule. Viacom suggests that "network" should be defined as an entity distributing more than two consecutive hours of programming carried live by affiliated stations covering at least 75% of television households. According to Viacom, UPN reaches 74% of television

faulty assumption as asserted by MAP and NASA, that a station's independent decision to carry a network's programming justifies ownership attribution because the network has thereby "influenced" the program selection of the station.¹³

In sum, a party's status as a program supplier (other than LMA broker, which the Commission proposes to address with a specific rule) adds nothing to its ability to influence the programming of a licensee in the sense that MAP, NASA and Viacom suggest of dominating a station's program choices against the wishes of a licensee. There is, accordingly, no reason to make program-supplier status a "trigger" for application of an "equity or debt plus" attribution rule.

II. The Proposed 10%, 20% and 33% Equity or Debt Thresholds Are Too Low

MAP proposes that the Commission attribute ownership

households through primary affiliates and 20% through secondary affiliates. Id. at 2 n.2.

¹³ Viacom fails to apply its theory of programming "influence" consistently to all program suppliers. It proposes that because syndicators make "sales of programming to stations in a competitive bidding environment and which do not contemplate broadcast of the programs in an interrelated manner," they should not be considered as "involved in selecting" programming as networks are in Viacom's scheme. Viacom Comments at 10. That attempt to distinguish syndication and network distribution is unpersuasive because in both cases stations choose to carry the programs. It appears that the scope of Viacom's proposed 10% rule has more to do with an attempt to handcuff potential competitors than with a principled distinction between network and syndicated program distribution arrangements. See Viacom Comments at 2 (describing Viacom's syndication interests).

interests under the "equity or debt plus" rule using a 20% equity or debt threshold instead of the 33% proposed by the Commission.¹⁴ Viacom's proposal uses a 10% equity or debt threshold applicable only to non-syndicator program suppliers. Both proposals -- and the Commission's proposal to use a 33% threshold -- rely on the unfounded assumption that such levels of equity or debt investment by themselves create a realistic potential that the holder can affect core licensee decisions. MAP criticizes the Commission's selection of 33% as "plucked out of thin air," but neither MAP nor Viacom provide any proof that their thresholds represent indicia of licensee control.

Indeed, Viacom appears to acknowledge that it is not the mere fact of a particular level of investment that gives the opportunity for licensee control, but the "corollary understandings and agreements" that may arise between the station and an investor and that may, by their terms, afford the investor a cognizable level of control.¹⁵ In our view no per se attribution rule can comprehend and accurately discriminate among the infinite variety of such understandings and agreements to determine which would justify attribution of ownership. As we noted in our opening comments, the Commission continues to have the power and responsibility under its existing standards of real-party-in-interest and de facto transfer of control to review a party's

¹⁴ See MAP Comments at 18-19.

¹⁵ See Viacom Comments at 5.

relationship with a licensee to look for actual control.¹⁶ Viacom has not made any showing that understandings or agreements justifying attribution must always, or are even likely to, exist where a party holds over 10% of a licensee's equity or debt.

MAP claims to present such evidence in support of its 20% "equity or debt plus" standard, stating that the "Commission has seen many instances of nonvoting equity or debt holders exercising very real and substantial control over station operations and editorial decision making."¹⁷ But MAP does not present any facts to support that expansive claim. MAP cites to matters in which parties hold various non-attributable interests in licensees,¹⁸ but MAP is unable to cite a single example of those parties "exercising very real and substantial control" over the stations or their editorial decision making. In sum, there simply is no necessary or even likely correlation between holding 20% of the equity or debt of a licensee and exercising control over the station's core operations.

Absent unusual facts that create "real party in interest" or "de facto transfer of control" issues, we continue to believe that only when a party's equity stake in a licensee exceeds 50% is there any basis for inquiring whether the investment creates actual

¹⁶ See ABC Opening Comments at 9.

¹⁷ MAP Comments at 19 (emphasis added).

¹⁸ Id. at 4, 19.

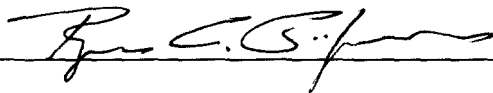
control.¹⁹ Even above that threshold, we believe only a presumption of attribution should attach, rebuttable by a case-by-case showing that the investor exercises no actual control over core station operations. The record is devoid of any evidence that lesser investment interests necessarily give the investor control over the station, and we believe with respect to those interests the need for predictability outweighs the benefits of case-by-case review.

Conclusion

The Commission should craft the attribution rules to include currently non-attributable interests that create a likelihood of control over the licensee. We believe the Commission's and commenters' proposals to use program-supplier status and equity or debt investment at 33% or lower to trigger attribution are overbroad and based on erroneous assumptions about likelihood of control. The Commission should give further consideration to ABC's 50% presumptive attribution proposal.

¹⁹ See ABC Opening Comments at 8-9.

Respectfully submitted,

By: 

Alan N. Braverman
Sr. Vice President & General Counsel

Sam Antar
Vice President, Law & Regulation

Roger C. Goodspeed
General Attorney, Law & Regulation

ABC, Inc.
77 West 66th Street
New York, New York 10023

Counsel for ABC, Inc.

March 21, 1997